USMAN AHMAD

v.

CHIN BROTHERS CONSTRUCTION CO

HIGH COURT MALAYA, SHAH ALAM
ABU SAMAH NORDIN J
[CIVIL SUMMONS NO: MT2-12-218-97]
21 JUN 2000

CIVIL PROCEDURE: *Affidavits - Filing and service - Affidavit opposing application to amend - Whether affidavit-in-reply served out of time - When time starts to run - Whether from date of service of sealed copy of application - Subordinate Courts Rules 1980, O. 24 rr. 4(2)(a) & (b) - Whether decision in Perbadanan Nasional Insurans preferable to Structural Concrete Sdn Bhd*

CIVIL PROCEDURE: *Preliminary objection - Notice to opponent - Notice given but intention to raise not deposed in affidavit - Whether amounts to waiver*

On 19 September 1997, the plaintiff served on the defendant an unsealed copy of his application to amend his statement of claim together with an affidavit in support. Later, on 21 October 1997, he served on the defendant the sealed copy of the application together with the supporting affidavit. On 4 November 1997, the defendant filed and served an affidavit-in-reply on the plaintiff. Subsequently on 20 November 1997, the plaintiff filed and served a further affidavit on the defendant. On the same day, each party served a written notice of preliminary objection on the other, objecting to the other's affidavit on the ground that it was filed out of time in contravention of O. 24 r. 4(2)(a) and (b) Subordinate Courts Rules 1980 ('SCR'). The judge dismissed the plaintiff's preliminary objection to the defendant's affidavit-in-reply and allowed the defendant's preliminary objection to the plaintiff's affidavit in reply to the defendant's affidavit-in-reply. The plaintiff appealed.

Held:

[1] The decision in *Perbadanan National Insurans Sdn Bhd* is preferable to that of *Structural Concrete Sdn Bhd*. This is because, when a party serves on the other an unsealed copy of an application together with a supporting affidavit, it is merely to give an advance notice or to alert the latter of a forthcoming application.

[2] Order 24 r. (2)(b) SCR applies to subsequent affidavits as well and not restricted to the first affidavit-in-reply only. Therefore, as no application for an abridgment of time was made, the plaintiff's affidavit in reply to the defendant's affidavit ought to be rejected.

[3] The plaintiff had by his own conduct waived his rights to raise the preliminary objection since he himself filed and served a further affidavit in reply to the defendant's, without even deposing therein of his intention to raise the objection when he knew and intended to raise the objection.

[Appeal dismissed with costs.]

Case(s) referred to:

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(refd)***
Elite Jewellers Sdn Bhd v. Wong Tin Kai [1998] 3 CLJ Supp 115 ***(refd)***
Mainah Suratman v. Rozinah Nizaruddin [1995] 5 CLJ 234 ***(refd)***
Majlis Daerah Dungun v. Tenaga Nasional Bhd [1999] 8 CLJ 337 ***(dist)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(foll)***
Public Bank v. Berjaya Housing Development Sdn Bhd & Ors [1995] 1 CLJ 237 ***(refd)***
Sarawak Electricity Supply Corporation v. MS Shipping Sdn Bhd [1998] 1 CLJ Supp 58 ***(dist)***
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(not foll)***

Legislation referred to:

Rules of the High Court 1980, O. 32 r. 13(2)(a), (b)
Subordinate Courts Rules 1980, O. 24 rr. 2(a), 4(2)(a), (b), O. 32 rr. 13(2)(a), (b) O. 52 r. 3(1)

For the appellant - BS Sidhu; M/s BS Sidhu & Co
For the respondent - En Varghese; M/s Jaffar & Menon

Reported by Izzaty Izzuddin

JUDGMENT

Abu Samah Nordin J:

This is an appeal by the appellant/plaintiff ("the appellant") against the decision of the learned Sessions Court Judge, Ampang, Selangor given on 2 December 1997 in respect of the following orders:

(i) dismissing the appellant's preliminary objection to the affidavit-in-reply by the respondent/defendant ("the respondent") which was filed and served out of time, in breach of O. 24 r. 4(2)(a) and (b) of the Subordinate Courts Rules 1980 ("SCR"); and

(ii) allowing the respondent's preliminary objection to the appellant's further affidavit, in reply to the respondent's affidavit-in-reply, which was served out of time in breach of O. 24 r. 4(2)(b) of the SCR.

The Facts

On 18 September 1997 the appellant filed a notice of application to amend his statement of claim together with an affidavit in support thereof. On 19 September 1997 the appellant served an unsealed copy of the application together with the affidavit in support thereof, on the respondent. On 21 October 1997, the sealed copy of the application with the affidavit in support was served on the respondent. On 4 November 1997 the respondent filed and served an affidavit-in-reply on the appellant. On 20 November 1997 the appellant filed and served a further affidavit on the respondent. On the same day, each party served a written notice of preliminary objection, objecting to the other's affidavit on the ground that it was filed out of time in contravention of O. 24 r. 4(2)(a) and (b) of the SCR.

The Preliminary Objections

(1) Affidavit-in-reply by the Respondent

O. 24 r. 4(2)(a) and (b) of the SCR enacts as follows:

(2) Except as otherwise provided by these rules –

(a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and

(b) a party intending to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

Order 24 r. 4(2)(a) and (b) of the SCR is in *pari materia* with O. 32 r. 13(2)(a) and (b) of the Rules of the High Court ("RHC") and as such authorities in respect of the latter provision may be relied upon in construing the former provision.

The learned counsel for the appellant objected to the respondent's affidavit-in-reply as it was filed and served outside the 14 days period as prescribed by O. 24 r. 4(2)(b) of the SCR. It was submitted that the 14 days period should run from the date of service of the unsealed copy of the application and the affidavit in support. It is not disputed that if the time begins to run from the date of the service of the unsealed copy of the application together with the affidavit in support, the respondent's affidavit-in-reply is out of time, that is, by one day. If the time begins to run from the date of service of the sealed copy of the application and the affidavit in support thereof, the affidavit-in-reply is within the 14 days period.

The appellant relied on the decision of the Court of Appeal in *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300. In that case the issue was whether the 14 days period within which an affidavit-in-reply must be filed and served on the other party should be computed from the date on which the affidavit intended to be replied was served, or 14 days from the date of service of the sealed copy of the summons-in-chambers in support of which the affidavit was sworn. If the 14 days period was computed from the date of service of the unsealed copy of the summons and the file copy of the affidavit in support, the affidavit-in-reply was out of time. It was within time, if it was computed from the date of service of the sealed copy of the summons and the affidavit in support thereof. The Court of Appeal held that the 14 days period under O. 32 r. 13(2)(b) of the RHC commenced from the date of service of the unsealed copy of the summons and the file copy of the affidavit in support.

The learned counsel for the appellant was gracious enough to point out that the Court of Appeal consisting of a different quoram, in *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 held that the 14 days period under O. 32 r. 13(2)(b) of the RHC started to run from the date of service of the sealed copy of the summons and the affidavit in support thereof. Siti Norma Yaacob JCA at p. 330 said:

Both the summons and affidavit must be filed and served on the other party as required by O. 32 r. (1) and (2) read together with r. 13(1)(a) of the same Order. The right to reply by affidavit is then opened to the other party but this right must be exercised within the 14 days period stipulated by sub-rule (2)(b) of O. 32 r. 13. The issue raised before us is when does time start to run?

The Court of Appeal held that the time started to run from the date of service of the sealed copy of the summons and the affidavit in support thereof. The purpose of serving the unsealed copy of the summons together with the affidavit in support can be nothing more than to give due notice to the respondent of the nature of the application and the grounds supporting the application.

The High Court is thus confronted with two conflicting decisions of the Court of Appeal. Both are equally binding on the High Court. The learned counsel for the respondent urged the court to follow the decision in *Perbadanan Nasional lnsurans Sdn Bhd.* In *Elite Jewellers Sdn Bhd v. Wong Tin Kai* [1998] 3 CLJ Supp. 115, Abdul Malik lshak J, when confronted with a similar situation, preferred the decision in *Perbadanan Nasional lnsurans Sdn Bhd.*

The Federal Court in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 held that the courts in the tiers below the Court of Appeal may choose between two conflicting decisions irrespective of the dates of those conflicting decisions. That decision gives the court subordinate to the superior court the discretion to make the choice, thus avoiding a possible deadlock or stalemate, without being disrespectful to the superior court.

I have considered both decisions carefully and with great respect, *vis-a-vis* O. 24 r. 4(2)(b) of the SCR. Order 24 r. 2(a) enacts that, "an affidavit... must be filed and served...". O. 52 r. 3(1) of the SCR provides that any document filed in the registry in any proceedings must be sealed with a seal showing the date on which the document was filed, and, any document not required by these rules to be sealed must show the date on which it was filed. In my view it is the affidavit or a copy of it which is filed in court that must, in law, be served on the other party.

It appears to me that O. 24 r. 4 of the SCR does not prohibit the parties from serving an unsealed copy of the application together with a supporting affidavit, which is yet to be filed or pending the issue of a filed copy but such action is outside and not within the ambit of the said provision. It is merely to give an advance notice or to alert the other party of forthcoming application. Hence, in my view, the decision in *Perbadanan National lnsurans Sdn Bhd* is preferable to that of *Structural Concrete Sdn Bhd.* In our case, the appellant served the sealed copy of the application and its supporting affidavit on the respondent on 21 October 1997. The respondent filed and served its affidavit-in-reply on 4 November 1997. This was well within the 14 days period as prescribed by O. 24 r. 4(2)(b) of the SCR. *Sarawak Electricity Supply Corporation v. MS Shipping Sdn Bhd* [1998] 1 CLJ Supp 58 is distinguishable as it was decided on O. 32 r. 13(2)(a) and not r. 13(2)(b) of the RHC.

(2) Further Affidavit by the Appellant

It was objected to as it was filed and served out of the 14 days period as prescribed by O. 24 r. 4(2)(b) of the SCR. That it was filed out of the 14 days period was not in dispute. The appellant's contention was that O. 24 r. 4(2)(b) of the SCR referred to the first affidavit-in-reply which must be filed and served within the prescribed period and it did not apply to any subsequent affidavit. *Majlis Daerah Dungun v. Tenaga Nasional Bhd* [1998] 1 MLJ 708 was cited as authority for this proposition. With respect, that case is distinguishable as it deals with O. 32 r. 13(1) of the RHC and not O. 32 r. 13(2) of the RHC. The learned judge, in the final part of his judgment explained,

> ... whereas in the case before me, it involves the construction of subrule (1) *vis-a-vis* subrule (2) of rule 13. Hence the issue of delay need not be considered.

In my view O. 24 r. (2)(b) of the SCR applies to subsequent affidavits. The very wording of the said order seems to suggest that. It is not restricted to the first affidavit-in-reply only. If it is, it defeats the very purpose it seeks to achieve, namely to prevent any last minute affidavit being filed so as to protract the hearing of any proceeding in chamber, since thereafter the parties, being freed from the time constraint, could file subsequent affidavits as and when they deem fit.

In the result, the appellant's further affidavit which was filed and served out of the 14 days period, ought to be rejected. No application was made before the learned Sessions Court judge, for an abridgment of time.

Waiver

It was submitted that the appellant, by filing a further affidavit without making known his intention therein to raise a preliminary objection, had waived his right to object to the respondent's affidavit-in-reply on the ground of non-compliance with O. 24 r. 4(2)(b) of the SCR. In *Jasabena Sdn Bhd v. Heng Foo & Anor* [1985] 1 MLJ 394, Edgar Joseph Jr. J in dismissing the preliminary objection said,

> Moreover, the respondents in this case had clearly waived their rights to take preliminary objection by filing afidavits in opposition and failing to give to the applicant prior notice of their intention to raise preliminary objection.

In *Public Bank v. Berjaya Housing Development Sdn Bhd & Ors* [1995] 1 CLJ 237 the High Court, overruled the defendant's preliminary objection as they had by their own conduct in filing the affidavits-in-reply waived their right to object to the defects in the plaintiffs affidavit.

In *Mainah Suratman v. Rozinah Nizaruddin* [1995] 5 CLJ 234 the respondent's counsel objected to the affidavit-in-reply affirmed by a valuer and property consultant on the ground that it was served out of time in breach of O. 32 r. 13(2)(b) of RHC. Yet, in spite of the objection, subsequent affidavits were filed. The High Court held that the further steps taken by the respondent in filing those affidavits clearly showed that the respondent had waived the non-compliance of the Rules of the High Court.

The Court of Appeal in *Structural Concrete Sdn Bhd v. Wing Tiek Holdings Bhd* [1997] 1 CLJ at p. 306 made the following observation:

> It is to be noted that the issue of late filing will not be a problem unless the adverse party raises an objection. If he does not do so and takes a step in the action, the non-compliance will be regarded as having been waived.

In the instant case the appellant's conduct was contradictory. He filed and served a further affidavit, in reply to the respondent's affidavit-in-reply and yet on the very day itself gave notice of preliminary objection that the respondent's affidavit-in-reply was served out of time. Why did the

appellant file and serve a further affidavit, without deposing therein of his intention to raise a preliminary objection, when he knew and intended to obiect to the respondent's affidavit-in-reply? In my view, the appellant had, by his own conduct, waived his right to raise the preliminary objection that the respondent's affidavit-in-reply was served out of time.

For the above reasons, the appeal is dismissed with costs.